CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 04-60407

NATIONAL LABOR RELATIONS BOARD, Petitioner

verses

SUPERIOR PROTECTION, INC., Respondent

Petition for Enforcement of Order of
The National Labor Relations Board
Nos. 16-CA-21399, 21495, and 10361

Filed February 16, 2005

Before DAVIS, SMITH, and

DENNIS, Circuit Judges

JERRY E. SMITH, Circuit Judge:

The National Labor Relations Board (the "Board") seeks enforcement of its order compelling respondent Superior Protection, Inc. ("Superior"), to bargain with United Government Security Officers of America, Local 229. Superior contends that enforcement should be denied on the sole ground that the collective bargaining unit certified by the Board improperly accreted (i.e., added) employees hired after the representation election into the certified bargaining unit without the benefit of an election, thus improperly assigning to the accreted employees the certified unit's choice of bargaining representative.

We disagree. The Board's bargaining unit determination did not automatically effect an accretion of newly-hired employees, and the union is not seeking to accrete those employees as a consequence of the unit determination. Accordingly, we grant the Board's application for enforcement.

Superior provides security services to federal agencies pursuant to contracts with the General Services Administration ("GSA"). One of these contracts obligates Superior to provide security officers to certain federal facilities in three Texas counties--Harris, Montgomery, and Galveston. In August 2001, the union filed a representation petition with the Board seeking certification as the collective-bargaining representative of security officers employed by Superior and "assigned to work in federally owned and leased property in Houston, Texas, including the

immediate surrounding areas, under the Federal Government contract for security services through the Employer (contractor)." Superior opposed the petition, contending that, although all security employees assigned to work at GSA facilities in Harris County[1] should be included, those in adjacent counties (Montgomery and Galveston) should be excluded from the certified unit.

After a hearing, the Board's Regional Director issued a decision finding that all security officers "assigned to work at GSA contract facilities in Harris, Montgomery, and Galveston counties" constituted the appropriate collective bargaining unit[2]. The Regional Director directed that an election be held among the employees in the unit. Superior requested Board review of the decision to include security officers from Montgomery and Galveston Counties, but the Board denied the request, finding that Superior had failed to raise any substantial issue warranting review.

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[1]The City of Houston is located primarily in Harris County.

[2] The Regional Director's unit determination provides:

> The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:
>
> *Included:* All permanent, full-time and regular part-time security officers assigned to work at GSA contract facilities in Harris, Montgomery and Galveston counties.
>
> *Excluded:* All office clerical employees, employees on temporary assignment, professional employees, managers and supervisors as defined by the Act.

A mail ballot election among unit employees was conducted by the Regional Director in October 2001. The secret ballots asked unit employees to vote up or down on whether they wished to be represented for purposes of collective bargaining by the union. Of the 30 unit employees then believed eligible to vote, 20 cast ballots, of which 9 voted in favor of representation by the union; 9 voted against; and 2 ballots were challenged and not counted.Superior and the union stipulated that one of the challenged ballots had indeed been cast by an ineligible voter. Thus, the single remaining challenged ballot, which had been cast by unit employee Kevin Trotter, was determinative. Superior maintained that Trotter was ineligible because he had been discharged before the election; the union countered by alleging that Superior had committed unfair labor practices by discharging Trotter for having testified at the representation hearing and for having engaged in union activity. Superior and the union litigated the validity of Trotter's challenged ballot and the related unfair labor practices complaint in a consolidated proceeding before an administrative law judge ("ALJ"). In August 2002, the ALJ sustained the union's unfair labor practices complaint, finding Superior's proffered reasons for discharging Trotter to be "pure subterfuge, masking the true motive of retaliation for Trotter's testimony at the Board proceeding and his manifest support" for the union. Thereafter, in a published decision issued in July 2003, the Board adopted the ALJ's unfair labor practices finding and directed the Regional Director to open and count Trotter's ballot, issue a revised tally of ballots, and provide the appropriate certification. *See* ***Superior Protection Inc.*, 339 N.L.R.B. 118, 2003 WL 21802944 (2003)**.Trotter's vote in favor of representation was added to a revised tally issued by

the Regional Director, yielding a 10 to 9 vote in favor of union representation. On August 25, 2003, the Regional Director certified the union as the exclusive collective-bargaining representative of employees in the previously certified bargaining unit: "[a]ll permanent, full-time and regular part-time security officers assigned to work at GSA contract facilities in Harris, Montgomery and Galveston counties."The union sought to bargain with Superior and requested information from Superior regarding unit employees. Superior refused to bargain and refused the union's request to provide information about unit employees.In response, the union filed an unfair labor practices complaint with the Board charging Superior with refusing to bargain and failing to furnish requested information in contravention of § 8(a)(1) and (5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1), (5). The Board's General Counsel issued a complaint, and Superior filed an answer in which it admitted its refusal to bargain and to furnish requested information but challenged the union's certification as bargaining representative on grounds that (1) the certified bargaining unit inappropriately included employees in Montgomery and Galveston counties; and (2) Trotter was not an eligible voter, and thus the union had not received a majority of valid votes. In January 2004, the Board issued a notice to show cause why summary judgment should not be granted in favor of the General Counsel. Superior responded by restating its initial challenges--the certified bargaining unit was inappropriate, and Trotter was not eligible to vote in the election--and by advancing a challenge to the Regional Director's decision to direct a mail ballot election and to the manner in which the election was conducted. In addition, Superior averred for the first time that, even if the certified unit was appropriate as an

original matter, it was no longer appropriate because (after the Regional Director's initial unit determination) Superior had entered into a second contract with GSA to provide security officers at eight additional federal facilities within the geographic scope of the certified unit. According to Superior, the employees at these additional federal facilities within the geographic scope of the certified unit would effectively be accreted to the existing unit without an election, in violation of Board policy. In August 2004, the Board granted summary judgment in favor of the General Counsel, holding that Superior's admitted refusal to bargain and furnish requested information constituted unfair labor practices in violation of § 8(a)(1) and (5). *See* ***Superior Protection Inc.*, 341 N.L.R.B. 35, 2004 WL 378968 (2004)**. In so doing, the Board refused to reexamine Superior's arguments regarding the propriety of the three-county certified bargaining unit and Trotter's eligibility, reasoning that they had been fully litigated and addressed in the pre-election proceeding and the consolidated ballot challenge/unfair labor practices proceeding. The Board similarly rejected on procedural grounds Superior's challenge to the Regional Director's decision to conduct a mail ballot election and to the manner in which the election was conducted. As for Superior's claim that the certified unit was no longer appropriate because the employees at the eight additional GSA facilities it now services within the geographic scope of the certified unit would necessarily (and improperly) be accreted to the smaller group of employees in the certified unit, the Board rejected this claim on three grounds. First, the Board noted that there was no indication that the Union was seeking to accrete these new employees to the existing unit; indeed, the Board pointed to a separate representation petition filed by the Union in January 2003

seeking to represent the new employees at the additional GSA facilities as a separate and distinct bargaining unit. [3]

Second, the Board reasoned that the new employees would not automatically be accreted to the existing unit as a consequence of the Board's unit determination, especially in light of Superior's contention that the new employees outnumber the existing unit employees and of the Union's apparent position (gauged from the separate representation petition filed by the Union) that the new employees constitute a separate appropriate bargaining unit. Third, the Board observed that Superior was not claiming that the two groups of employees (old and new) had merged in a manner that had obscured their separate identity. Consequently, the Board entered an order compelling Superior to bargain with and furnish information to the Union. Superior filed a motion for reconsideration alleging that a "cursory inquiry" conducted by the company after the Board's decision revealed that the new employees at the additional GSA facilities had in fact merged or consolidated with the existing unit employees. The Board denied the motion, finding that Superior had not carried its burden of demonstrating that it had been diligent in discovering all available evidence and that the evidence was in fact previously unavailable. In May 2004, the Board filed the instant application for enforcement of its order compelling Superior to bargain with and furnish information to the Union.

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[3] This petition has been docketed and is referred to by the Board in its summary judgment decision as Case 16RC10480. The Board's summary judgment opinion reveals that the Regional Director took no action on this separate representation petition during the pendency of the instant representation petition, instead holding it in abeyance pending resolution of this matter.

II.

Having abandoned a majority of the arguments advanced to the Board, [4] Superior now attacks the Board's order on a single legal ground: It contends that, because the certified bargaining unit includes within its scope employees hired after the representation election to work at additional federal facilities, the Board improperly accreted these new employees to the certified unit without affording them an opportunity to manifest their will in a union election. Because the union has not *287 sought to accrete these employees, nor have the employees been automatically accreted to the existing unit as a consequence of the Board's unit determination, this contention is unavailing.

A.

We review questions of law decided by the Board *de novo*. "[I]f the Board's construction of the statute is 'reasonably defensible,' its orders are to be enforced." ***NLRB v. Motorola, Inc.*, 991 F.2d 278, 282 (5th Cir.1993)** (quoting ***Standard Fittings Co. v. NLRB*, 845 F.2d 1311, 1314 (5th Cir.1988)**).

B.

An accretion occurs when new employees, or present employees in new jobs, perceived to share a sufficient community of interest with existing unit employees, are

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[4] Because Superior's brief deals only with the alleged accretion, the company has abandoned its arguments related to the propriety of the original certified unit; Trotter's eligibility to vote in the union-shop election; the Regional Director's decision to direct a mail ballot election; and its challenge to the manner in which the mail ballot election was conducted.

added to an existing bargaining unit without being afforded an opportunity to vote in a union election.[5] The accretion doctrine thus assigns to the accreted employees the existing unit's choice of bargaining representative. *E.g.*, ***Baltimore Sun Co. v. NLRB*, 257 F.3d 419, 427 (4th Cir.2001)**. "Essentially, the doctrine is designed to preserve industrial stability by allowing adjustments in bargaining units to conform to new industrial conditions without requiring an adversary election every time new jobs are created or other alterations in industrial routine are made." ***NLRB v. Stevens Ford, Inc.*, 773 F.2d 468, 473 (2d Cir.1985)**.

Notwithstanding any benefits to industrial stability, because accreted employees are absorbed into an existing collective bargaining unit without an election and are governed by the preexisting unit's choice of bargaining representative, the accretion doctrine sits in substantial tension with the guarantee of employee self-determination reflected in § 7 of the NLRA, which provides: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to

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5 The most common circumstances giving rise to a claim of accretion involve an employer with a preexisting bargaining unit that acquires an additional facility where the new employees' interests align with existing unit employees, and the union attempts to add the new employees to the existing bargaining unit without an election. *See generally* Michael J. Frank, *Accretion Elections: Making Employee Choice Paramount*, 5 U. PA. J. LAB. & EMP. L. 101, 10708 (2002); 1 THE DEVELOPING LABOR LAW 404 (Patrick Hardin ed., 3d ed. 1992) ("An employer's acquisition or construction of an additional operation or facility after the execution of the contract frequently gives rise to a claim of accretion.").

refrain from any or all such activities.... 29 U.S.C. § 157.[6] Thus, although § 7 provides employees with the right to bargain collectively through "representatives of their own choosing" and "the right to refrain from" collective bargaining,[7] the accretion doctrine operates to contravene both of these rights--i.e., accreted employees are forced to accept both union representation itself and representation by a particular union without benefit of an election.

[3] Recognizing this conflict, the Board's jurisprudence "has historically favored employee elections, reserving accretion orders for those rare cases in which it could conclude with great certainty, based on the circumstances, that the employees' rights of self-determination would not be

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6 *See, e.g.*, *Pix Mfg. Co.*, 181 N.L.R.B. 88, 90, 1970 WL 25188 (1970) ("[W]hen a claim of accretion is made to an existing unit, a favorable determination forecloses a vote and restricts the employees in the exercise of their basic right to select their bargaining representative. That right is the predominant consideration under Section 7 of the Act and is to be restricted only under 'compelling conditions.' "); *Baltimore Sun*, 257 F.3d at 429 (noting that "misuse of accretion poses a significant threat to the self-determination rights of employees guaranteed by § 7 of the NLRA"); *NLRB v. Ill.-Am. Water Co.*, 933 F.2d 1368, 1377 (7th Cir.1991) ("[C]ourts exhibit heightened concern when applying the accretion doctrine because the accreted employees receive union representation without voicing their own choices through an election.") (citing *Consolidated Papers, Inc. v. NLRB*, 670 F.2d 754, 757 n. 4 (7th Cir.1982)); *id.* ("To a certain extent, an accretion interferes with the employees' 'freedom to choose their own bargaining agents.' ") (citing *Consolidated Papers*, 670 F.2d at 757 n. 4).

7 *See Baltimore Sun*, 257 F.3d at 426 ("This core provision guards with equal jealousy employees' selection of the union of their choosing and their decision not to be represented at all.") (citing *Newport News Shipbuilding & Dry Dock Co.*, 233 N.L.R.B. 1443, 1452, 1977 WL 9449 (1977)).

thwarted." ***Baltimore Sun*, 257 F.3d at 427**.[8] Accordingly, the Board will accrete employees to an existing unit without an election "only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted." ***Safeway Stores, Inc.*, 256 N.L.R.B. 918, 1981 WL 20532 (1981)** (footnotes omitted).[9]

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8 *See also* ***Pan Am. Grain Co.*, 317 N.L.R.B. 442, 447, 1995 WL 301828 (1995)** (" 'In furtherance of the statutory duty to protect employees' right to select their bargaining representative, the Board follows a restrictive policy in finding accretion.' ") (quoting ***United Parcel Serv.*, 303 N.L.R.B. 326, 327, 1991 WL 146794 (1991)**); ***Boire v. Int'l Bhd. of Teamsters*, 479 F.2d 778, 795 (5th Cir.1973)** ("[T]he Board has traditionally been reluctant to find an accretion, even where the resulting unit would be appropriate, in those cases where a smaller unit, consisting solely of the accreted unit, would also be appropriate and the § 7 rights of the accreted employees would be better served by denying the accretion."); ***Stevens Ford*, 773 F.2d at 473** ("[B]ecause the accretion doctrine generally imposes a bargaining representative on employees without an election, it should be employed restrictively, with close cases being 'resolve[d] ... through the election process.' ") (quoting ***Westinghouse Elec. Corp. v. NLRB*, 440 F.2d 7, 11 (2d Cir.1971)**).

9 *See also* ***Baltimore Sun*, 257 F.3d at 428** ("When the two-part test of *Safeway Stores* is faithfully applied, accretion of employees to a bargaining unit will occur only in those extraordinary cases in which the Board can be reasonably certain that no election is required and that the accreted employees share such similar interests with employees in the bargaining unit that they would choose it."). This test is substantially more stringent than the traditional community of interest test applied in "the Board's more ordinary decision to certify initially a particular group of employees as an appropriate bargaining unit." ***NLRB v. DMR Corp.*, 795 F.2d 472, 475 (5th Cir.1986)**. In that context, "[t]he unit chosen need not be the most appropriate, but only one which is appropriate under the circumstances." ***Ochsner Clinic v. NLRB*, 474 F.2d 206, 209 (5th Cir.1973)**. In the accretion context, however, "[a] group of employees is

And, in furtherance of the NLRA's policy of employee self-determination, doubts as to whether new employees share the requisite overwhelming community of interest with the existing unit are to be resolved through the election process. [10] Moreover, the Board will not *289 permit an accretion if the size of the group to be accreted overshadows the number of employees in the existing unit.[11]

C.

There is no basis in the record warranting the conclusion that the union is attempting to accrete the new employees at the additional facilities to the certified unit. To the contrary, as the Board observed, while the representation petition was pending before the Board, the union filed a separate representation petition seeking to be certified as the exclusive collective bargaining representative of the new employees at the additional facilities as a *separate* and *distinct* bargaining unit. In fact, the union's representation petition expressly classified the scope of the proposed unit as including "[a]ll sites *other* than locations in" the instant representation proceeding. (Emphasis added.)Because the union has not sought to accrete the new employees into the existing unit, Superior's reliance on ***Renaissance Ctr. P'ship,***

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properly accreted to an existing bargaining unit when they have such a close community of interests with the existing unit that they have no true identity distinct from it." ***NLRB v. St. Regis Paper Co.***, 674 F.2d 104, 107-08 (1st Cir.1982).

[10] *See, e.g.*, ***Baltimore Sun***, 257 F.3d at 429; ***Westinghouse***, 440 F.2d at 11; ***Martin Marietta***, 270 N.L.R.B. 821, 822, 1984 WL 36443 (1984).

[11] *See, e.g.*, ***Gould, Inc.***, 263 N.L.R.B. 442, 445, 1982 WL 23866 (1982).

239 N.L.R.B. 1247, 1979 WL 8637 (1979), and evidence of an alleged merger between the two groups of employees is particularly misplaced. In *Renaissance,* the Board dismissed a union's clarification petition that sought to accrete a numerically larger group of new employees to an existing bargaining unit, even though the evidence revealed that the two groups of employees merged and had become indistinguishable. Here, however, the union is not seeking to clarify the confines of the existing unit by accreting new employees in light of evidence of employee merger or consolidation, but instead is seeking to treat the new employees as a separate bargaining unit. Moreover, we reject Superior's contention that the new employees at the additional GSA facilities will automatically be accreted to the existing unit as a consequence of the unit certified by the Board. Superior is no doubt correct that the certified unit includes on its face all security employees staffing GSA facilities in the three-county area.[12] But, contrary to Superior's assertions, this does not mean that the new employees at the additional facilities have been, or necessarily will be, accreted to the certified unit: "[T]he Board ... does not automatically accrete employees at a new [facility] solely because the unit description includes all the employer's [facilities], present and future, in a geographic area...." ***Coca-Cola Bottling Co.*, 310 N.L.R.B. 844, 844, 1993 WL 92246 (1993)**. Indeed, as the substantive law regarding accretion indicates, a finding of accretion is far from automatic: The Board will permit an accretion only in

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[12] As we have indicated, the certified bargaining unit includes "[a]ll permanent, full-time and regular part-time security officers assigned to work at GSA contract facilities in Harris, Montgomery and Galveston counties."

the small class of cases warranting a finding that the new employees cannot be considered a separate appropriate unit and that they share an overwhelming community of interest with the preexisting unit.

To be sure, this case does present some circumstances that would militate in favor of a finding of accretion by the Board--e.g., the fact the new employees were acquired after the unit determination but likely would have been included in the certified unit if they had been present earlier. [13] At the same time, however, Superior devotes considerable ink to a proposition that appears to present a nearly insurmountable obstacle to a board finding of accretion--namely, that the new security employees (of which there are 42) outnumber the existing unit employees (of which there are 29). [14] In fact, in

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[13] In this regard, consider, for example, the Board's explanation in *Pan American Grain* of when a finding of accretion would be justified:

> One aspect of this restrictive policy has been to permit accretion only in certain situations where new groups of employees have come into existence after a union's recognition or certification or during the term of a collective bargaining agreement. If the new employees have such common interests with members of an existing bargaining unit the new employees would, if present earlier, have been included in the unit or covered by the current contract, then the Board will permit accretion in furtherance of the statutory objective of promoting labor relations stability.

***Pan Am. Grain*, 317 N.L.R.B. at 447** (citing ***Gould*, 263 N.L.R.B. at 445**).

[14] *See, e.g.*, ***Carr-Gottstein Foods Co.*, 307 N.L.R.B. 1318, 1318, 1992 WL 175232 (1992)** ("When the unrepresented group sought to be accreted numerically overshadows the existing unit, the board will not accrete the larger number of unrepresented employees without giving them a chance to express their representational desires.").

rejecting Superior's accretion argument, the Board recognized that "accretion would be inappropriate if the employees at the additional facilities numerically overshadow the employees that existed at the time of the election." Thus, should the union alter its current course and eventually seek to accrete the new employees to the existing unit, Superior can raise this numerical objection among others in that proceeding.

ENFORCEMENT GRANTED.C.A.5,2005.N.L.R.B. v. Superior Protection, Inc.401 F.3d 282, 176 L.R.R.M. (BNA) 2769, 150 Lab.Cas. P 10,449

Superior Protection, Inc. *and* United Government Security Officers of America—Local 229. Case 16–CA–23210
April 23, 2004

Order Denying Motion

By Members Liebman, Schaumber, and Walsh

The Respondent moves for reconsideration of our February 25, 2004 Decision and Order granting the General Counsel's Motion for Summary Judgment and requiring the Respondent to recognize and bargain with the Union as the representative of the unit certified in Case 16–RC–10361. See 341 NLRB No. 35. In its response to the General Counsel's Motion for Summary Judgment, the Respondent had contended, for the first time, that the certified unit is no longer appropriate because, in May 2002, after the election and consolidated unfair labor practice/challenged-ballot hearing had been held, the Respondent contracted with the General Services Administration (GSA) to provide security services at eight additional facilities within the geographic scope of the three-county unit. The Respondent asserted that the previously unrepresented employees at the eight new locations outnumbered the unit employees 42–29, and would effectively be accreted to the unit pursuant to the Board's bargaining order.

We rejected the Respondent's contention, noting, among other things, that the Respondent does not contend that the two groups of employees have been merged or consolidated, thereby completely obscuring their separate

identity. Cf. Renaissance Center Partnership, 239 NLRB 1247 (1979) (Board processed employer's RM petition, even though it was filed during the certification year, where the certified group of security personnel at the Renaissance Center had been consolidated and intermixed with a larger, unrepresented group of security personnel at a hotel within the same commercial development, the union had filed a unit-clarification petition seeking to accrete the larger group into the unit, and the evidence showed that the groups were now indistinguishable and that the only appropriate unit consisted of the overall security force).

The Respondent now moves for reconsideration, claiming that a "cursory inquiry" initiated after receipt of the Board's decision revealed that "at the present time," the two groups have, in fact, been "merged and consolidated." The Respondent asserts that the two groups are commonly supervised, perform identical duties, wear identical uniforms, enjoy identical terms of employment, permanently transfer between locations covered by the two GSA contracts, temporarily fill in for one another between locations covered by the first and second GSA contracts, and are otherwise indistinguishable, except that the first GSA contract requires the security officers to wear batons and the second does not. See affidavit of Reginald Jones (Exh. A). The General Counsel has filed an opposition, and the Respondent filed a reply thereto.

Having duly considered the matter, we deny the Respondent's motion for reconsideration. Section 102.48(d)(1) of the Board's Rules permits a party, because of "extraordinary circumstances," to move for reconsideration, rehearing, or reopening of the record after the Board's

decision or order. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

In order to establish that evidence is "newly discovered," the movant must show facts indicating that it "acted with reasonable diligence to uncover and introduce the evidence" and that it was therefore "excusably ignorant" of the evidence previously. *Fitel/Lucent Technologies*, 326 NLRB 46 fn. 1 (1998). Here, the Respondent generally asserts that it had unspecified conflicts that prevented adequate time for legal research and an investigation into the current status of the two groups of employees. The Respondent also notes that "motions for extension of time were filed and for the most part denied by the Board's Executive Secretary."

However, as noted by the General Counsel, the Respondent had approximately 3 months from the date of the charge, and 7 weeks from the date of the complaint, to research and investigate the unit issue, before its response to the General Counsel's Motion for Summary Judgment was due. Further, as indicated above, the Respondent implicitly acknowledges that a "cursory" investigation could have uncovered the evidence. Thus, we find that the Respondent has failed to carry its burden.

The Respondent has also not shown that the evidence was unavailable prior to the Board's February 25, 2004 Decision and Order. The Respondent states only that: (1) there had been "no significant merging" of the two groups at the time the Union filed a petition to represent the employees at the eight new facilities in January 2003 (see fn. 4, supra); (2) the merger of the two groups occurred "after" that petition was filed; and (3) the two groups are merged "at the present time." The Respondent, however, does not contend that the merger occurred after the Board's February 25 decision.

Finally, it is not clear that the new evidence would require a different result. In Renaissance Center Partnership, supra, the Board found that the two previously separate groups of security officers had become indistinguishable in part because the officers were now "randomly assigned to sections of the complex." 239 NLRB at 1247. Here, as indicated above, the Respondent con-tends only that employees "permanently transfer" and "temporarily fill in for one another" between locations under the first and second GSA contracts. This assertion itself indicates that employees are permanently assigned to a location rather than "randomly assigned." While it also indicates that there is permanent and temporary interchange between locations under the old and new GSA contracts, the Respondent does not reveal how often this occurs.

Accordingly, for all the foregoing reasons, the motion for reconsideration is denied.

Dated, Washington, D.C. April 23, 2004

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[1] The certified unit is:

INCLUDED: All permanent, full-time and regular part-time security officers assigned to work at GSA contract facilities in Harris, Montgomery and Galveston counties.

EXCLUDED: All office clerical employees, employees on temporary assignment, professional employees, managers and supervisors as defined by the Act.

[2] The General Counsel's Motion was filed on January 5, and the Notice to Show Cause issued on January 12. The Executive Secretary's Office granted Respondent a 1-week extension to file a response, to February 2. The Executive Secretary's Office denied the Respondent's second request for an extension of time.

[3] The Respondent also argues that it was the *Region's* responsibility to investigate the matter, pursuant to the new petition filed by the Union in January 2003. The Respondent asserts that the January 2003 petition sought to represent both groups of employees in the same unit. This assertion is incorrect and contrary to the Respondent's own prior response to the General Counsel's Motion for Summary Judgment. As Respondent stated in that response (p. 4), the January 2003 petition specifically states that it is seeking to represent the Respondent's employees in the Houston area at "all sites *other than* locations in 16-RC-10361. See Unit description, case pending before NLRB." Moreover, the Respondent acknowledges that "there was no significant merging" of the two groups of employees at the time the January 2003 petition was filed. Reply at 2. Thus, even if the Region had conducted an investigation at that time, it would not have uncovered the evidence.

[4] Member Schaumber finds it unnecessary to rely on the analysis set out in this paragraph and the accompanying footnote because he finds for the reasons set out above that the Respondent has not established that the evidence it seeks to adduce is newly discovered or has become available only after the Board's February 25, 2004 Decision and Order.

[5] Moreover, the Respondent may have had a bargaining obligation with respect to the permanent and/or temporary transfers (which it presumably would not have satisfied given its general refusal to recognize and bargain with the Union). See generally *J.W. Rex Co.*, 308 NLRB 473, 497–498 (1992), enfd. mem. 998 F.2d 1003 (3d Cir. 1993); *United Technologies Corp.*, 296 NLRB 571, 572 fn. 3 (1989); and *Kansas Education Assn.*, 275 NLRB 638, 639 (1985). If so, this would be an additional reason to find that the evidence of transfers is not a basis to revisit the certification. See *Telemundo de Puerto Rico, Inc. v. NLRB*, 113 F.3d 270, 155 LRRM 2338, 2345 (1st Cir. 1997) (evidence that employees had been recently assigned supervisory duties did not warrant revisiting certification since such changes were made unilaterally and violated the duty to bargain), and cases cited there. Compare *Frito-Lay, Inc.*, 177 NLRB 820 (1969) (Board vacated certification and dismissed 8(a)(5) complaint where employer had instituted nationwide organizational changes based on a management study begun prior to the representation proceeding, which changes eliminated the area managers' autonomy over day-to-day operations, the "essential factor" supporting the Board's finding that a unit limited to three of six districts was appropriate).

Superior Protection Inc. and United Government Security Officers of America–Local 229.
Case 16–CA–23210

February 25, 2004

DECISION AND ORDER

By Members Liebman, Schaumber, and Walsh

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on November 5, 2003, the General Counsel issued the complaint on November 19, 2003, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain and to furnish information following the Union's certification in Case 16–RC–10361. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); Frontier Hotel, 265 NLRB 343 (1982).) The Respondent filed an answer, and a first amended answer, admitting in part and denying in part the allegations in the complaint.

On January 5, 2004, the General Counsel filed a Motion for Summary Judgment. On January 12, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On February 2, the Respondent filed a response, and on February 10, the General Counsel filed a reply thereto.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain and to furnish information, but contests the validity of the certification based on its contentions in the representation proceeding that: 1) the petitioned-for unit covering all of its security officers assigned to work at General Services Administration (GSA) contract facilities in three Texas counties is inappropriate, and the unit should be limited to security officers assigned to GSA contract facilities in Harris County (Houston and Pasadena); and 2) employee Kelvin Trotter is not an eligible voter because he was discharged prior to the election. In addition, the Respondent contends that the Regional Director improperly directed a mail ballot election, and that the Region failed to send mail ballots to eligible voters and to count mail ballots cast by eligible voters. Finally, the Respondent asserts that, in May 2002, after the representation case was litigated, it entered into a separate contract with GSA to provide guard services at eight additional facilities located within the geographic scope of the certified unit, and that the employees at these facilities would effectively be accreted to the unit pursuant to the Board's bargaining order in this case. The Respondent asserts that this raises a question regarding the appropriateness of the unit because the employees at these additional facilities, who were employed by the previous contractor, outnumber the unit employees at the facilities existing at the time of the election, 42 to 29, and it is well-established Board policy that a larger unit may not be accreted into a smaller unit without an election.

We find that the Respondent has not raised any representation issue warranting a hearing in this proceeding. The Respondent's contentions that the three-county unit is inappropriate and that Trotter is not an eligible voter were fully litigated and addressed by the Board in the preelection proceeding and the consolidated unfair labor practice/challenged ballot proceeding, respectively.[1] The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require us to reexamine the Board's findings on those issues.

With respect to Respondent's contention that the Regional Director improperly directed a mail-ballot election, the Respondent never requested the Board in the representation proceeding to review the Regional Director's decision to conduct the election by mail. Although the Respondent mentioned in its request for review of the Regional Director's Decision and Direction of Election that it opposed the decision to hold a mail ballot election, it did so only in support of its contention that the petitioned-for three-county unit is inappropriate; that is, the Respondent claimed that the Regional Director's analysis on the mail ballot issue supported the Respondent's position on the scope-of-unit issue. The Respondent did not request the Board to overturn the Regional Director's direction of a mail ballot election. The Respondent, therefore, is precluded under Section 102.67(f) of the Board's Rules from raising the issue in this proceeding. See Ritz-Carlton Hotel Co., 321 NLRB 659 fn. 1 (1996), enfd. 123 F.3d 760 (3d Cir. 1997).

For similar reasons, the Respondent is also precluded

from raising an issue in this proceeding about the manner in which the Region conducted the mail ballot election. Although the Respondent raised this issue in the consolidated unfair labor practice/challenged ballot proceeding, it failed to do so in timely filed objections as required by Section 102.69 of the Board's Rules. The administrative law judge, therefore, refused to allow the Respondent to litigate the issue, since it was not relevant to Trotter's eligibility, the only issue that the Respondent did timely raise. See 339 NLRB No. 118, slip op. at 3 fn. 2 (2003). The Board affirmed the judge's ruling and the Respondent does not offer to produce any newly discovered and previously unavailable evidence or allege that there are special circumstances that would require us to reconsider that ruling in this proceeding. See Sundor Brands, Inc., 325 NLRB 499 (1998); Bishop Mugavero Center for Geriatric Care, 323 NLRB 642 (1997) (employer's failure to file timely objections to the conduct of the election precludes it from raising the issue in the subsequent refusal-to-bargain proceeding absent newly discovered and previously unavailable evidence).

Finally, we also find that no issue warranting a hearing is raised by the Respondent's contention that the certified unit is no longer appropriate because the employees at the eight additional GSA facilities it now services within the geographic scope of the unit would necessarily be accreted to the smaller group of employees who work at the GSA facilities it serviced at the time of the election. As an initial matter, there is no indication that the Union is seeking to accrete the employees at the additional facilities into the unit. On the contrary, as the Employer acknowledges, the Union filed a petition on January 13, 2003 (Case 16-RC-10480), seeking to represent the employees at those

facilities in a separate unit.

Further, contrary to the Respondent's contention, the employees at the additional facilities would not necessarily be accreted into the unit pursuant to the Board's bargaining order. Although the unit description on its face includes all security officers assigned to GSA contract facilities located in the three-county area, "the Board does not automatically accrete employees at a new [facility] solely because the unit description includes all the employer's [facilities], present and future, in a geographic area." Coca-Cola Bottling Co. of Wisconsin, 310 NLRB 844 (1993). As the Respondent itself argues, accretion would be inappropriate if the employees at the additional facilities numerically overshadow the employees at the facilities that existed at the time of the election. See, e.g., Gould, Inc., 263 NLRB 442, 445 (1982). Accretion would also be improper if, as the Union appears to assert in its January 13, 2003 petition in Case 16–RC–10480, the employees at the additional facilities would constitute a separate appropriate unit. See, e.g., Ready Mix USA, Inc., 340 NLRB No. 107, slip op. at 8–9 (2003); Passavant Retirement & Health Center, 313 NLRB 1216, 1218 (1994); and Houston Division, 219 NLRB 388 (1975). The Respondent does not address this unit question.

Finally, the Respondent does not contend that the two groups of employees have been merged or consolidated, thereby completely obscuring their separate identity. Cf. *Renaissance Center Partnership*, 239 NLRB 1247 (1979) (Board processed employer's RM petition, even though it was filed during the certification year, where the certified group of security personnel at the Renaissance Center had been consolidated and intermixed with a larger, unrepresented group of security personnel at a hotel within

the same commercial development, the Union had filed a unit-clarification petition seeking to accrete the larger group into the unit, and the evidence showed that the groups were now indistinguishable and that the only appropriate unit consisted of the overall security force).

Accordingly, we find that the Respondent has not raised any representation issue or special circumstances that are properly litigable in this unfair labor practice proceeding or that warrant reconsideration of the certification. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); *Action Automotive, Inc.*, 284 NLRB 251, 255–256 (1987), enfd. 853 F.2d 433 (6th Cir. 1988), cert. denied 488 U.S. 1041 (1989).

We also find that there are no genuine issues of material fact warranting a hearing regarding the Union's request for information. The complaint alleges, and the Respondent's answer admits, that the Union requested the following information from the Respondent by letter dated September 30, 2003:

1. A list of all posts and assignments in the unit and their Federal jurisdiction (i.e. partial, proprietary, concurrent, or exclusive), and the number of productive hours performed at each assignment.

2. The current list of names, addresses, and phone numbers for all employees in Houston.

As indicated above, the Respondent also admits that it refused to provide the foregoing information. Although the Respondent denies that the requested information is necessary for, and relevant to, the Union's performance of its

duties as the exclusive collective-bargaining representative of the unit employees, the Respondent does so based solely on its contention that the Union was not properly certified.

Moreover, it is well established that information concerning unit employees' names, addresses, phone numbers, work assignments, and hours is presumptively relevant for purposes of collective bargaining and must be furnished on request. Here, although the Union's request for the names, addresses, and phone numbers of all employees in Houston is not expressly limited to unit employees in Houston, the context suggests that the Union is only seeking information concerning unit employees. In any event, to the extent the Union's information request could be construed as requesting nonunit information, this would not excuse the Respondent's blanket refusal to comply with the request. It is well established that an employer may not simply refuse to comply with an ambiguous or overbroad information request, but must request clarification or comply with the request to the extent it encompasses necessary and relevant information.

Accordingly, we grant the Motion for Summary Judgment and will order the Respondent to bargain with the Union and to furnish the Union with the information it requested relating to unit employees.

On the entire record, the Board makes the following Findings of Fact:

i. jurisdiction

At all material times, the Respondent, a Delaware corporation with an office and place of business in Houston, Texas, has been engaged in the business of providing

security services for federal agencies.

During the 12-month period preceding issuance of the complaint, the Respondent provided services valued in excess of $50,000 directly to customers located outside the State of Texas.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

ii. alleged unfair labor practices

A. The Certification

Following the mail ballot election conducted October 15 through 29, 2001, the Union was certified on August 25, 2003, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

INCLUDED: All permanent, full-time and regular part-time security officers assigned to work at GSA contract facilities in Harris, Montgomery and Galveston counties.

EXCLUDED: All office clerical employees, employees on temporary assignment, professional employees, managers and supervisors as defined by the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

About September 30, 2003, the Union, by letter, requested the Respondent to bargain and to furnish necessary and relevant information, and, since about the same date, the

Respondent has failed and refused to do so. We find that the Respondent's conduct constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

Conclusion of Law

By failing and refusing on and after September 30, 2003, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit and to furnish the Union necessary and relevant information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement. We shall also order the Respondent to furnish the Union the information it requested relating to unit employees.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964),

enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Superior Protection Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Government Security Officers of America–Local 229, as the exclusive bargaining representative of the employees in the bargaining unit, and refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

INCLUDED: All permanent, full-time and regular part-time security officers assigned to work at GSA contract facilities in Harris, Montgomery and Galveston counties.

EXCLUDED: All office clerical employees, employees on temporary assignment, professional employees, managers and supervisors as defined by the Act.

(b) Furnish the Union the information it requested on September 30, 2003, relating to unit employees.

(c) Within 14 days after service by the Region, post at its facility in Houston, Texas, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 30, 2003.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 25, 2004

No. 05-123

IN THE

SUPREME COURT OF THE UNITED STATES

SUPERIOR PROTECTION, INC.,
Petitioner,

v.

N.L.R.B.
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1.

Whether the certification by the National Labor Relations Board (the "Board") of a collective bargaining unit of security guards employed by a GSA contractor almost two years following a representation election was an illegal accretion in violation of the National Labor Relations Act, 29. U.S.C. Section 151, *et. seq.* (the "Act"). In this case, a majority of the guards included within the description of the certified unit did not become employed until after the election, when the employer acquired additional locations by successfully bidding on another GSA contract, following which the employees working under both contracts were merged into a single unit.

STATEMENT OF INTERESTED PARTIES

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit were:

Superior Protection, Inc. - Petitioner
Michael Jay Kuper - Counsel for Petitioner
Raymond L. Kalmans - Counsel for Petitioner
National Labor Relations Board - Respondent
David Seid - Counsel for Respondent
Aileen Armstrong - Counsel for Respondent
Meredith Jason - Counsel for Respondent
Curtis Wells - N.L.R.B. District 16 - Regional Director
James Carney - USGOA Local 1225 President

TABLE OF CONTENTS

Opinions Below.....1

Statement of Jurisdiction.....1

Statutory Provisions Involved.....1

Supplemental Statement.....2

Conclusion.....6

Appendix

TABLE OF CITED AUTHORITIES

Cases

Nott Company, Equipment Division and International Union of Operating Engineers, Local 49; 345 NLRB No. 23.....

Statutes

28 U.S.C. § 1254 1).....1

29 U.S.C. § 158(a) (1), (3) and (4).....1

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is at 401 F.3d 282 (5th Cir. 2005). The citations of the two Decisions and Orders of the Board are at 341 N.L.R.B No. 35 (2004), and 341 N.L.R.B. No. 86 (2004).

STATEMENT OF JURISDICTION

This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1) because the petition asks the Court to issue a writ of certiorari to review a case in the United States Court of Appeals for the Fifth Circuit. The Court of Appeals entered its opinion on February 16, 2005. This petition is being filed with the Clerk of this Court within 90 days from the date of the judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 158(a) (1) and (5) Unfair labor practices
a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title....

(5) to refuse to bargain collectively with the representatives of his employees....

SUPPLEMENTAL STATEMENT

Superior Protection, Inc. (Superior), Petitioner, files this supplemental brief, pursuant to Rule 15, calling the Court's attention to a new case, *Nott Company, Equipment Division*, 345 NLRB No. 23 (2005) (*Nott*).

THE FACTS

Nott was decided by the National Labor Relations Board (the "Board") on August 27, 2005. The fact situation in *Nott* is strikingly similar to that in this case. In Nott, however, unlike in the instant case, the Board correctly interpreted and applied the rules of merger, integration, and accretion. In *Nott*, the Board held that an employer (the "Employer") could withdraw recognition from a union during the term of a collective bargaining agreement (the "CBA") because the Employer had acquired another company with an equal amount of employees, who were unrepresented, and who were later merged with the original unit of employees represented by the union.

The facts in *Nott*, briefly, are as follows:

The Employer was engaged in the distribution and repair of forklifts. The Employer had a forty year collective bargaining relationship with International Union of Operating Engineers, Local 49 (the "Union), and there was a collective bargaining agreement (the "CBA") in effect with a term of four years, from August 1, 1996, through July 31, 2000. On July 16, 1998, the Employer lost its Hyster Forklift franchise, and on October 1, 1998, the Employer purchased the assets of Metro, a Nissan Forklift franchisee. On October 2, 1998, the fourteen Metro employees doing the same work as the employees in the bargaining unit covered by the CBA became employed by the Employer. At that time the Employer had fourteen employees in the bargaining unit. Shortly, even though this was not the original plan prior to the acquisition, the two groups of employees were merged and consolidated. The Employer thereupon withdrew recognition from the union and refused to continue to honor

the CBA. The union filed refusal to bargain charges against the Employer. The Board found no violation, because:

> ....there is an integration of functions and work forces, but because the unrepresented and represented groups of employees are equal in number, there can be no accretion. Where there is an integration, but no accretion, an employer is not obligated to continue to bargain with the union, even as to an existing group of employees. **Thus...we find that the [Employer] did not violate the Act when it withdrew recognition from the Union. Id. at p. 6..... Finally, although industrial stability is an important policy goal, it can be trumped by the statutory policy of**

> **employee free choice. That policy is expressly in the Act, and indeed lies at the heart of the Act. In the circumstances of this case, we adhere to that policy. *Id.* at p. 9.** (emphasis added).

On May 31, 2005, Superior filed RM and UC petitions with the Board Regional office seeking an election among the employees in the merged unit to determine whether the Union represented a majority of them, since the Regional Office had failed to process the prior representation petition filed by the Union. In a June 21, 2005, letter, the Board's Regional Director formally blocked processing of the petitions filed by Superior, giving as a reason Superior's refusal to bargain with the Union. The Regional Director acknowledged that Superior had refused to bargain with the Union as the representative of the merged unit on the grounds that a majority of the employees in the merged unit

were employed by acquisition, and were unrepresented. No collective bargaining agreement is or has been in effect.

Nott is a correct interpretation and application by the Board of the principles and law of merger, integration, and accretion. The Board in *Nott* went so far as to permit the employer to withdraw recognition during the term of the CBA. In this case, the Board has not interpreted or applied those principles or law correctly. The reason given by the Board's Regional Director is circular and revealing: **the Board has been attempting to force Superior to recognize the Union as the exclusive bargaining representative of the merged and integrated group of employees, a majority of whom have never been represented and have never even had the opportunity to vote in an election. Superior will not voluntarily comply, because recognizing the Union would constitute an illegal accretion. The Board's Regional Director asserts that Superior's refusal to bargain with the Union without an election is an unfair**

labor practice, and utilizes it as a pretext for blocking the Union's and Superior's petitions for an election to determine the wishes of the employees in the merged and integrated unit, a majority of whom were employed after the election as the result of an acquisition. In this case, unlike in *Nott*, the Union has never been recognized, and there is no CBA in effect. Superior should not be ordered to bargain unless and until an election is held, and a majority of the unit employees vote for the Union.

The petition for writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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